

## **CIVIL RULE 16.5**

### **ALTERNATIVE DISPUTE RESOLUTION**

#### **(a) Purpose and Scope of This Local Rule.**

(1) Purpose. Pursuant to the findings and directives of Congress in 28 U.S.C. § 651 et seq., the primary purpose of this local rule is to provide parties to civil cases and proceedings in bankruptcy in this district with an opportunity to use alternative dispute resolution (ADR) procedures. This rule is intended to improve parties' access to the dispute resolution process that best serves their needs and fits their circumstances, to reduce the financial and emotional burdens of litigation, and to enhance the court's ability to timely provide traditional litigation services. Through this rule, the court authorizes and regulates the use of mediation and arbitration.

#### **(2) Scope.**

(A) Cases Pending Before a District Judge or Magistrate Judge. This local rule applies to all civil cases pending before any district judge or magistrate judge in this district.

(B) Proceedings Pending Before a Bankruptcy Judge. Under 28 U.S.C. § 651 et seq., and the court's inherent authority, proceedings pending before any bankruptcy judge in this district also may be afforded an opportunity to participate in ADR.

(3) Rules Specific to Individual ADR Processes. While many of the provisions of this local rule apply to all ADR processes conducted under its auspices, there are differences between ADR processes that require some process-specific prescriptions. The District of Idaho administratively sponsors the following ADR processes:

#### **(A) MEDIATION.**

(i) Definition. Mediation is a process in which an impartial third party (the "mediator") facilitates communication between parties and assists them in their negotiations (e.g., by clarifying underlying interests) as they attempt to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. Whether a settlement results from mediation and the nature and extent of the settlement are within the sole control of the parties.

(ii) Criteria for Inclusion on the Panel of Mediators. In order to qualify for appointment to the court's panel of mediators, the applicant shall certify that he or she:

1. must have been admitted to practice for not less than five (5) years or possess a particular expertise, training, or background in mediation;

2. must be a member of the bar of this court or a retired or non-practicing attorney or judge;

3. must have attended a minimum of forty (40) hours of core mediator knowledge and skills training, including role-play simulations of mediated disputes. Such training must have included such competencies as information gathering, effective communication, ethical concerns, the role of a mediator as a neutral third party, control of the mediation process, and problem analysis. The training required by this section shall be acquired by completing programs approved by an accredited college or university or by one of the following organizations: Idaho State Bar, Idaho Mediation Association, or Society of Professionals in Dispute Resolution.

(iii) Continuing Education to Remain on the Panel of Mediators. In order to remain on the panel of mediators maintained by the District of Idaho, the mediator must submit proof that he or she has completed a minimum of twenty (20) hours of additional training or education during the preceding two (2) calendar years; said continuing education shall require the same standard of approval as that in section (1)(C) herein.

#### (B) ARBITRATION.

(i) Definition. Arbitration is a process whereby an impartial third party (the “arbitrator”) hears and considers the evidence and testimony of the disputants and others with relevant knowledge and issues a decision on the merits of the dispute. The arbitrator makes an *award* on the issue(s) presented for decision. The arbitrator’s award is binding or non-binding as the parties may agree in writing.

(ii) Criteria for Inclusion on the Panel of Arbitrators. In order to qualify for appointment to the court’s panel of arbitrators, the applicant shall certify that he or she:

1. shall have been admitted to the practice of law for at least ten (10) years, a retired attorney or judge having retired in good standing;

2. shall have, for not less than five (5) years, committed fifty percent (50%) or more of their professional time to matters involving litigation;

3. shall have considerable experience with civil litigation in federal court; and

4. shall have had substantial experience serving as a neutral in dispute resolution proceedings.

(iii) Continuing Legal Education to Remain on the Panel of Arbitrators. In order to remain on the panel of arbitrators maintained by the District of Idaho, the arbitrator must submit

proof that he or she has completed the required number of continuing legal education hours to remain an attorney in good standing with the Idaho State Bar.

(iv) Standards for Certification of Arbitrators. All arbitrators shall be certified to perform services in accordance with the following standards:

1. The arbitrator shall take the oath or affirmation described in 28 U.S.C. § 453; and
2. The arbitrator shall be subject to the disqualification rules under 28 U.S.C. § 455.

(v) Eligibility of Cases for Referral to Arbitration. No civil action or proceeding in bankruptcy shall be referred to arbitration except upon written consent of all parties. Notwithstanding the parties' request or consent to refer a case to arbitration, the court shall decline to make such referral if it finds that:

1. The action is based on an alleged violation of a right secured by the Constitution of the United States;
2. Jurisdiction is based in whole or in part on 28 U.S.C. § 1343;
3. The relief sought includes money damages in an amount greater than \$150,000.00; or
4. The objectives of arbitration would not be realized for any other reason.

(vi) Procedure for Consenting to Arbitration. Any request for reference to arbitration shall be in writing, signed by all parties and their counsel, and directed to the judge to whom the case is assigned. All such requests shall:

1. state whether the parties desire that the entire case be referred to arbitration. If the parties desire that only certain issues or portions of the case be referred to arbitration, the parties shall identify with particularity those issues or portions of the case and state the reason(s) why such a request should be granted;
2. state whether the arbitrator's award will be binding, with trial de novo waived, or non-binding, with trial de novo permitted if a request therefor is timely served and filed;

3. propose a discovery plan, a timetable for completion of the proposed discovery, and the date by which the arbitration shall be completed;

4. acknowledge that the arbitration shall be governed by the provisions of 28 U.S.C. Chapter 44, as the same may be amended from time to time, and, to the extent applicable, 9 U.S.C. § 1 et seq.;

5. contain a certification that the parties have been provided access to materials describing the arbitration program, and that they agree to arbitration freely and knowingly; and

6. provide such other information as may assist the court in determining whether to grant the request.

(vii) **Single Arbitrator.** Unless otherwise ordered by the court, all arbitrations under this rule will be held before a single arbitrator who shall have the power to:

1. conduct the arbitration hearings;
2. administer oaths and affirmations; and
3. make awards based upon the facts and the law.

(viii) **Authority for Arbitration.** The provisions of 28 U.S.C. Chapter 44, as the same may be amended from time to time, shall govern all aspects of the arbitration proceeding authorized.

1. The arbitrator will apply the Federal Rules of Evidence with respect to all evidence offered by any party.

2. The arbitrator will apply Federal Rule of Civil Procedure 45 with respect to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this rule.

3. No party or attorney shall be prejudiced in any way for refusing to participate in arbitration.

(ix) **Parties May Choose a Panel of Three Arbitrators.** Upon notification of the consent by all parties to participate in the arbitration process in very complex cases, the ADR Administrator will provide each party with an identical list of potential arbitrators. Each party will be given ten (10) days to choose five (5) arbitrators, ranking them in order of descending preference and returning the list to the ADR Administrator. The ADR Administrator will select one arbitrator from plaintiff's list(s) and one arbitrator from defendant's list(s). The two arbitrators chosen will select an additional arbitrator jointly agreeable to them from the roster of arbitrators received from the ADR Administrator.

Any decision/award must be agreed to by at least two of the selected arbitrators. All other arbitration rules and procedures remain the same.

(x) **The Award Must Be Submitted in Writing.** The arbitrator shall make his or her award in writing and shall file the award under seal with the Clerk of Court promptly after the arbitration hearing is closed, together with proof of service on all other parties by United States mail, addressed to the parties or, if represented, to the parties' attorney(s) of record. Unless the parties have waived trial de novo, the clerk shall seal the award, and the award shall remain sealed and the contents thereof not made known to any judge who might be assigned the case until the time has expired for a party to seek a trial de novo with no party timely serving and filing such a demand; *provided, however*, that the award may be unsealed after final judgment has been entered in the case or the action has otherwise been terminated.

(xi) **In the Event of Non-Resolution.** If, in any non-binding arbitration conducted under this section, a resolution of all aspects of the dispute does not result and the case proceeds to trial, no reference to the arbitration proceeding, or the result thereof, may be made to the trier of fact; *provided however*, that nothing in this rule shall prevent a party from presenting or using at the trial evidence presented in the arbitration proceeding, if such evidence is otherwise admissible under the Federal Rules of Evidence or the parties have stipulated to its use.

(xii) **Trial De Novo.** If trial de novo has not been waived by all parties, any party may demand a trial de novo of the issues referred to arbitration by serving and filing a request therefor within thirty (30) calendar days after service of the award. If a demand for trial de novo is timely served and filed, the case will be treated for all purposes, and the trial shall be conducted, as if no arbitration had occurred.

(xiii) **Parties' Rights Are Not Limited.** Nothing in this rule limits any party's right to agree to arbitrate any dispute, regardless of the amount involved, pursuant to Title 9, United States Code, or any other provision of law.

(4) **Parties Retain Right to Secure ADR Services Outside the Programs Sponsored by the Court.** Nothing in this rule precludes the parties from agreeing to seek ADR services outside the court's program. Parties remain free to use any form of ADR and any neutral they choose. When they elect to proceed outside the court's program, however, they shall not be supported by court staff or resources, and they cannot invoke the authority of the court to fix or enforce the process rules of their ADR undertaking.

**(b) Process Administration.**

(1) **ADR Administrator.** The ADR Administrator is responsible for implementing, administering, overseeing, and evaluating the ADR program and procedures covered by this local rule. These responsibilities extend to educating litigants, lawyers, judges, and court staff about the ADR program and rules. In addition, the administrator shall assure that appropriate systems are maintained for recruiting,

screening, and training neutrals, as well as for maintaining on an on-going basis the neutrals' ability to provide role-appropriate and effective services to the parties.

(2) Rules and Materials Available. The Clerk of Court shall make pertinent rules and explanatory materials available to the parties.

**(c) Selection of ADR Procedure.**

(1) Mandated Early ADR Selection Process.

(A) The Parties' Duty to Consider ADR, Confer, and Report. No later than ten (10) days prior to the Rule 16 scheduling conference, unless otherwise ordered, in every case to which this rule applies, the parties must meet and confer about (i) whether they might benefit from participating in some ADR process, (ii) which type of ADR process is best suited to the specific circumstances in their case, and (iii) when the most appropriate time would be for the ADR session to be held. In their case management statement, the parties must report their shared or separate views about the utility of ADR, which ADR procedure would be most appropriate, and when the ADR session should occur.

(B) Designation of Process. After considering the parties' submissions, the court may order the parties, on appropriate terms and in conformity with this rule, to participate in ADR. The court may refer the case to mediation or, with the consent of all parties, to arbitration under 28 U.S.C. § 654 et seq., or to an ADR procedure which, by stipulation of all parties, has been tailored to meet the specific needs of the case.

(2) Referral to ADR During the Pretrial Period. Notwithstanding the provisions of paragraph (c)(1)(B) above regarding the early selection process, at any time before entry of final judgment, the court may, on its own motion or at the request of any party, order the parties to participate in mediation or, with the consent of all parties, arbitration.

(3) Protection Against Unfair Financial Burdens. Assigned judges shall take appropriate steps to assure that no referral to ADR results in an imposition on any party of an unfair or unreasonable economic burden.

**(d) Panel of Neutrals and Selection.**

(1) Panel of Neutrals. For each separate type of ADR procedure authorized under this rule, the court shall assure that separate panels are maintained of persons who are trained and otherwise qualified to serve as neutrals. Only persons who agree to serve on the terms set forth in this local rule and whose background, training, and skills satisfy the requirements that the court establishes for the particular type of ADR procedure, shall be admitted to and remain as members of the panel for that process.

(2) Selection of the Neutral. The court adopts the following procedures to facilitate party participation in selecting the neutral.

(A) Parties Select Neutral. After a case is referred to an ADR process, the ADR Administrator will forward the respective panel of neutrals that the parties may choose from. Each party must submit the names of ten (10) neutrals from the list, ranking them in order, and return the list of ten (10) to the ADR Administrator. At the time all lists are received from all parties, the ADR Administrator will advise all parties of the neutral selected. The neutral chosen will be notified by the ADR Administrator, at which time the neutral will contact all parties to schedule and conduct the ADR session(s).

(B) Appointment of the Neutral When Parties Agree. If the parties agree on a neutral and confirm his or her availability, they must notify the ADR Administrator of their selection. At the time, the ADR Administrator will notify the neutral who will contact all parties in order to schedule and conduct the ADR session(s).

(C) Appointment of a Neutral When Parties Disagree. If the parties cannot agree on a neutral, they must advise the ADR Administrator. The ADR Administrator will appoint an available neutral from the appropriate panel. The ADR Administrator will then notify the neutral who will contact all parties in order to schedule and conduct the ADR session(s).

(D) Documents Provided by the Court to the Neutral. Promptly after the neutral is designated, the ADR Administrator shall provide him or her with a copy of: (i) the Order of ADR Reference and (ii) the case docket sheet.

**(e) Disqualification of Neutrals.**

(1) Applicable Standards. No person may serve as a neutral in an ADR proceeding under this rule in violation of the standards set forth in (i) 28 U.S.C. § 455 or (ii) any applicable standard of professional responsibility or rule of professional conduct.

(2) Mandatory Disqualification and Notice of Recusal. A prospective neutral who discovers a circumstance requiring disqualification shall immediately submit to the parties and to the ADR Administrator a written notice of recusal. The parties may not waive a basis for disqualification that is described in 28 U.S.C. § 455(b).

(3) Disclosure and Waiver of Non-Mandatory Grounds for Disqualification. If a prospective neutral discovers a circumstance that would not compel disqualification under an applicable rule of professional conduct or under 28 U.S.C. § 455(b), but that might be covered by 28 U.S.C. § 455(a) (impartiality might reasonably be questioned), the neutral must promptly disclose that circumstance in a notice of conflict of interest to the ADR Administrator. The parties may waive a possible basis for disqualification that is premised only on 28 U.S.C. § 455(a), but any such waiver must be in writing and

delivered to the ADR Administrator within ten (10) days of the party receiving notice of the conflict of interest.

**(f) Compensation of Neutrals.** Subject to subparagraph (c)(3), Protection Against Unfair Financial Burdens, above, neutrals shall be compensated by the parties, equally, at a rate specified by the neutral. Actual transportation expenses reasonably incurred by neutrals will be reimbursed equally by the parties. Any neutral may voluntarily serve on a pro bono basis.

**(g) Immunity of Arbitrator.** All persons serving as arbitrators under this local rule are deemed to be performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity. Mediators are not afforded this same protection.

**(h) Integration With Case Management.** Neither the parties' agreement to participate in an ADR procedure nor the court's referral of an action to ADR reduces the assigned judge's power and responsibility to maintain overall management control of a case before, during, and after the pendency of an ADR process.

**(i) Telephone Conference With Neutral Before ADR Session.** Promptly after being appointed to serve in a case, the neutral shall schedule a brief joint telephone conference with all counsel to discuss (1) fixing a convenient date and place for the session, (2) the procedures that will be followed during the session, (3) who shall attend the session on behalf of each party, (4) what material or exhibits should be provided to the neutral before the session or brought by the parties to the session, (5) any issues or matters that it would be especially helpful to have the parties address in their written pre-session statements, and (6) any and all information regarding the compensation of the neutral for services and expenses.

**(j) Confidentiality of ADR Proceedings.**

(1) Generally Applicable Provision. Except as provided in this local rule or by 28 U.S.C. § 657 (arbitrations), and except as otherwise required by law or as stipulated in writing by all parties and the neutral, all communications made in connection with any ADR proceeding under this local rule shall be privileged and confidential.

(2) Limitations on Communication With Assigned Judge. No person may disclose to the assigned judge any communication made, position taken, or opinion formed by any party or neutral in connection with any ADR proceeding under this local rule except as otherwise (A) stipulated in writing by all parties and the neutral, (B) provided in this local rule, (C) provided in 28 U.S.C. § 657 (for arbitrations), or (D) ordered by the court in connection with proceedings to determine whether the parties entered an enforceable agreement and, if so, what its terms are.

(3) Authorized Studies and Assessments of Program. Nothing in this rule shall be construed to prevent any participant or neutral in an ADR proceeding under this rule from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate



any aspect of the court's ADR program or to enforce any provision of this local rule. The identity of the sources of such information shall be appropriately protected.

**(k) Neutral's Report That ADR Process Has Been Completed.**

(1) Timing and Limited Content. No more than five (5) days after the ADR process has been completed, and by the deadline fixed in the Order of ADR Reference, the neutral must submit to the ADR Administrator a case status form that reports limited information regarding the scheduling and outcome of the ADR session(s). This form also includes information regarding whether the parties will be submitting stipulations and dismissal documents. The case status report must not be filed with the Clerk of Court or sent to the assigned judge.

(2) Prohibition on Disclosure of Confidential Communications or Neutral's Opinions. Absent a written stipulation signed by all parties, in submitting the case status report, the neutral must not disclose to the assigned judge any confidential ADR communication or any opinions or thoughts the neutral might have about the merits of the litigation, about how it should be managed, or about the character of any party's participation in the ADR proceeding.

<p><b>RELATED AUTHORITY</b></p>
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<p>28 U.S.C. § 651 et seq.</p>
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